

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BEAU DAVID PRICE §
Plaintiff §
§
§
V. § CASE NO. 11-00644-SS
ALAN STEEN, JOEL MORENO,
ROD VENNER, ANDY PENA, AND
RICK CRUZ,
Defendants §

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR
LEAVE TO FILE SECOND AMENDED COMPLAINT**

TO THE HONORABLE SAM SPARKS, United States District Judge:

COMES NOW the Defendants, Alan Steen, Joel Moreno, Rod Venner, Andy Pena, and Rick Cruz, and file this response in *opposition* to Plaintiff's Motion for Leave to File Second Amended Complaint [Doc. 25]. In response, the Defendants state as follows:

1. Defendants timely filed their original motion to dismiss pursuant to Rule 12(b) [Doc. 8].
2. In response to the motion to dismiss, Plaintiff sought leave to file an amended complaint [Doc. 12].¹ The motion was granted and this Court dismissed as moot the pending motion to dismiss [Doc. 14].
3. Despite having knowledge of the legal grounds on which Defendants seek the dismissal of all claims in Plaintiff's Original Complaint, the amendments to Plaintiff's Original Complaint were less than meaningful and Defendants again sought dismissal [Doc. 18]. Defendants' First Amended Motion to Dismiss is presently pending before this Court.

¹ Pursuant to Fed. R. Civ. P. 15(a)(1), however, Plaintiff need not have sought permission to file an amended complaint because it was his right to do so.

4. Plaintiff now seeks yet another bite at the apple to amend his Complaint, despite already having had such an opportunity and with the Defendants' original motion to dismiss as a guide. Justice was served in allowing Plaintiff the opportunity to amend his Complaint to address the first motion to dismiss. Justice will not be so served by allowing Plaintiff another opportunity. *See Fed. R. Civ. P. 15(a)(2).* The benefit of having Defendants' legal arguments did little to enhance Plaintiff's First Amended Complaint. As a result, justice does not require that Plaintiff have yet another opportunity to amend.

5. Regardless of the whether his being able to file his Second Amended Complaint is required to do justice, Plaintiff's offered Second Amended Complaint does not amend away the legal grounds on which Defendants have sought dismissal in their pending First Amended Motion to Dismiss. As a result, allowing Plaintiff to amend would be futile. *See Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 386-87 (5th Cir. 2003).

Accordingly, Defendants oppose Plaintiff's Motion for Leave to File Second Amended Original Complaint and pray that it be denied.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF FILING AND SERVICE

I, Timothy E. Bray, hereby certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on this 25th day of January, 2012, with the Clerk of Court for the Western District of Texas, and that counsel identified below would be electronically advised of the filing. Nevertheless, a courtesy copy of this motion was also sent by U.S. First Class Mail to the following:

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